SOON CHEE KONG v. PUBLIC PROSECUTOR.

[Court of Appeal (Foster-Sutton, C.J., Thomson and Wilson, JJ.) February 24, 1951]

[F.M. — Criminal Reference No. 1 of 1951]

Customs Enactment 1936, ss. 106 and 108 — Forfeiture — Powers of Magistrate or Judge as to release.

This matter came before the Court of Appeal as a result of a Certificate given by the Public Prosecutor under section 34 of the Courts Ordinance, 1948, and the Court was asked to determine whether a Magistrate, or a Judge of the Supreme Court on an appeal from a Magistrate, may, when refusing an Order of forfeiture under section 106 of the Customs Enactment, 1936, order that the goods shall be released, and thereby preclude the operation of section 108 of the Enactment.

Held, that sub-section (ii) of section 106 and sub-section (v) of section 108 of Customs Enactment, 1936 only enable the Courts to order the forfeiture of goods, and that action can only be taken if it is proved to the satisfaction of the Court that they were liable to seizure under the Enactment. If goods seized are not, in fact, liable to seizure under the Enactment, their release should follow as matter of law. The power to order release of goods liable to forfeiture is clearly and unequivocally vested only in the executive.

CRIMINAL REFERENCE.

A. J. Bostock-Hill amicus curiae.

C. Wylie for the respondent.

Cur. Adv. Vult.

The judgment of the Court was delivered by:—

Foster Sutton, C.J. : — This matter came before us as a result of a Certificate given by the Public Prosecutor under section 34 of the Courts Ordinance, 1948, and we are asked to determine whether a Magistrate, or a Judge of the Supreme Court on an appeal from a Magistrate, may, when refusing an Order of forfeiture under section 106 of the Customs Enactment, 1936, order that the goods shall be released, and thereby preclude the operation of section 108 of the Enactment.

Before the matter which led to this Reference arose there were two conflicting decisions* on the point given by Judges of the Supreme Court, and Taylor J. in this case held that, when refusing an Order of forfeiture under section 106 of the Enactment, the Court has a discretion to order that the goods be released, and he made an Order to that effect.

On behalf of the Public Prosecutor it was argued, *inter alia,* that where goods were the subject matter of or were used in the commission of an offence under the Enactment, they are automatically liable to seizure, and as such are liable to forfeiture, and that once that liability has attached to any goods the Court has no discretion to order their release. It was contended that to hold otherwise the Court would have to read words into the Enactment implying a discretion such as appear in sub-section (ii) of section 407 of the Criminal Procedure Code, and that to do so would have the effect of nullifying and over-riding the provisions of section 108 of the Customs Enactment.

It was further argued on behalf of the Public Prosecutor that the policy incorporated in the legislation is clear and logical; that where goods are not liable to seizure under the Enactment they are not liable to forfeiture, and there is no necessity in such a case for any Order of release, because that follows as a matter of law.

Mr. Bostock-Hill, who appeared on behalf of the appellant in the Court below, at our invitation appeared as *amicus curiae* to argue the case on his behalf. He contended, *inter alia,* that the words "may be forfeited" in sub-section (ii) of section 106 of the Enactment imply that the Court has a discretion to order that goods be released. He pointed out that the wording of the sub-section is different to the wording of section 202 of the United Kingdom Customs Laws Consolidation Act, 1876, which expressly provides that goods "shall be forfeited", and that the forfeiture provisions of the Customs Enactment, 1936, are penal ones, and as such should be construed, if there is any ambiguity, which he submitted there is, in favour of the subject.

In our opinion once it has been proved to the satisfaction of a Magistrate that an offence against the Customs Enactment has been committed and that the goods were the subject matter of or were used in the commission of the offence, there are only two courses open to him under sub-section (ii) of section 106 of the Enactment; firstly to make an Order that the goods be forfeited; or secondly to abstain from making any Order. To hold otherwise would necessitate reading words into the section which the Legislature did not see fit to include.

If a Magistrate abstains from making an Order of forfeiture, section 108 of the Enactment lays down a clear and comprehensive procedure under which the disposal of the goods in question is provided for.

* **Beh Chang Hin v. Public Prosecutor** (1950) M.L.J. 239; **Public Prosecutor v. Nai Hor Par** Ipoh Criminal Appeal No. 11 of 1947 (Unreported).

Any person asserting that he is the owner of such goods and that they are not liable to forfeiture may personally or by his agent, authorised in writing in that behalf, give notice to the Senior Officer of Customs that he claims the goods. Upon receipt of such notice the Senior Officer of Customs is required to refer the claim to the Comptroller who is empowered to direct that the goods be released or he may direct the Senior Officer of Customs to refer the matter, by way of Information, to the Court of a First Class Magistrate for decision. The Magistrate then issues a summons requiring the person asserting that he is the owner of the goods and the person from whom they were seized to appear before him. If at the conclusion of the hearing of the matter the Magistrate is satisfied that the goods are liable to forfeiture under the Enactment he is empowered to order that they be forfeited.

If no Order for forfeiture is made and no person has asserted that he is the owner of the goods and that they are not liable to forfeiture, sub-section (ii) of section 108 of the Enactment provides that the goods shall be "taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure".

Hard cases can be dealt with *ex gratia* under sub-section (vi) of section 108 of the Enactment which enables the High Commissioner to order any goods seized under the Enactment whether forfeited or not to be delivered to the proprietor thereof upon such terms and conditions as he may deem fit.

To sum up, in our view, sub-section (ii) of section 106 and sub-section (v) of section 108 of the Enactment only enable the Courts to order the forfeiture of goods, and that action can only be taken if it is proved to the satisfaction of the Court that they were liable to seizure under the Enactment. If goods seized were not, in fact liable to seizure under the Enactment, their release should follow as a matter of law. The power to order the release of goods liable to forfeiture is clearly and unequivocally vested only in the executive.

For the reasons I have already given the sentence imposed by the Magistrate is restored.

Sentence restored.

THE COMPTROLLER OF INCOME TAX v. G. B. ROCHE.

[Orig. Civ. Juris. (Jobling, J.) December 4, 1950]

[Penang — Income Tax Appeal No. 2 of 1950]

Income Tax — Income Tax Ordinance, 1947, s. 31(4) — Employment on probation in 1947 — Statutory income for year of assessment 1948.

This was an appeal from the decision of the Board of Review.

The respondent came to Malaya on the 29th June, 1947, for the purpose of taking up employment with the Pilots Association, Penang. He was employed on probation until 1st August, 1947, when he was offered and accepted a partnership in the Pilots Association as from 1st of August, 1947 and carried on as a partner during the year of Assessment, 1948. Under section 31(4) of the Income Tax Ordinance, the respondent was assessed for income tax upon his income from 1st August, 1947 to 31st July, 1948. Respondent appealed against this assessment and the Board of Review allowed his appeal holding that the probationary period from 29th June, 1947 to 31st July, 1947 was an essential condition of the ultimate partnership and that the employment must therefore be considered to have commenced on 29th June, 1947 and the respondent assessed on his total income for 12 months from that date.

Held, on appeal, that the respondent had one kind of employment from the 29th June, 1947 to the 31st July, 1947 and on 1st August, 1947, he commenced to carry on a different employment and he carried it on throughout the year of assessment and therefore he was correctly assessed for the year of assessment 1948, for full year's income as from the 1st August, 1947.

INCOME TAX APPEAL.

J. V. M. Shields (Federal Counsel), for the appellant.

C. O. Lim for the respondent.

Cur. Adv. Vult.

Jobling, J. : — The respondent in this case came to Malaya on the 29th June, 1947, for the purpose of taking up employment with the Pilots Association, Penang. He was employed and undertook some duties in connection with this Association until 1st August, 1947, when he was offered and accepted a partnership in the Pilots Association as from the 1st August, 1947. A partnership deed between himself and the existing partners in the Association with effect from 1st August, 1947, was drawn up, and this partnership deed has been put in in evidence. On these facts respondent was assessed by the Income Tax Department under section 31(4) of the Income Tax Ordinance, 1947, on his income for the 12 months from 1st August, 1947, i.e., the commencement of his partnership. This was an assessment in respect of the year commencing on 1st January, 1948. Respondent appealed against this assessment and the Board of Review allowed his appeal holding that the probationary period from 29th June,